

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Telephone Number Portability	)	
	)	CC Docket No. 95-116
Repeal of Section 52.31 of the	)	
Commission's Rules Regarding	)	
Commercial Mobile Radio Service	)	
Local Number Portability	)	

**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

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October 16, 2003

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**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

Pursuant to the September 16, 2003 Public Notice of the Federal Communications Commission ("Commission" or "FCC"),<sup>1</sup> Nextel Communications, Inc. ("Nextel") submits the following comments in support of the "Expedited Petition For Rulemaking To Rescind The CMRS LNP Rule" filed by the Cellular Telecommunications & Internet Association ("CTIA"), Cingular Wireless LLC, AT&T Wireless Services Inc. and ALLTEL Communications, Inc. (collectively, "Petitioning Carriers").<sup>2</sup> The Petitioning Carriers assert that the Commission lacks statutory authority to impose local number portability ("LNP") requirements on Commercial Mobile Radio Service ("CMRS") carriers and, therefore, request that the Commission rescind the rule.

**I. BACKGROUND**

On June 6, 2003 the United States Court of Appeals for the District of Columbia Circuit (the "Court") dismissed in part and denied in part a petition by the CTIA and Verizon Wireless

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<sup>1</sup> Public Notice, Consumer & Governmental Affairs Bureau Reference Information Center Petitions for Rulemaking Filed, CC Docket No. 95-116 (Sept. 16, 2003).

<sup>2</sup> In the Matter of Telephone Number Portability Repeal of Section 52.31 of the Commission's Rules Regarding Commercial Mobile Radio Service Local Number Portability, *Expedited Petition for Rulemaking to Rescind the CMRS LNP Rule*, CC Docket No. 95-116 (June 16, 2003) ("Expedited Petition").

requesting forbearance from enforcement of 47 C.F.R. §52.31, which applies LNP requirements to CMRS carriers.<sup>3</sup> In dismissing the Petition without addressing the legal arguments regarding the Commission's authority to impose LNP requirements on CMRS providers, the Court stated:

[T]here are at least two notable circumstances in which the Court will entertain challenges beyond a statutory time limit to the authority of any agency to promulgate a regulation: (1) following enforcement of the disputed regulation; and (2) following an agency's rejection of a petition to amend or rescind the disputed regulation.<sup>4</sup>

On June 16, 2003, the Petitioning Carriers filed an Expedited Petition requesting the Commission rescind LNP requirements imposed on CMRS carriers by 47 C.F.R. §52.31 because the Commission lacks statutory authority to mandate such an obligation on CMRS carriers.<sup>5</sup> Herein, Nextel supports the Petitioning Carriers' position that Congress did not grant the Commission authority to mandate wireless LNP.

## II. DISCUSSION

### A. Congress imposed LNP requirements only on local exchange carriers.

In Section 251 Congress limited the class of carriers subject to LNP requirements by creating a "carefully-calibrated regulatory regime," which includes a "three-tiered hierarchy of

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<sup>3</sup> See *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, 330 F.3d 502 (D.C. Cir. 2003). This case evolved from a previous stipulation between the Commission and Bell Atlantic NYNEX Mobile, Inc. in which the FCC concurred that, in exchange for Bell Atlantic NYNEX Mobile's voluntary dismissal of its appeal of the Order mandating wireless LNP, the issue could be raised in a subsequent proceeding. See *Joint Motion for Dismissal, Bell Atlantic NYNEX Mobile, Inc. v. FCC*, No. 97-9551 (10<sup>th</sup> Cir. Filed March 19, 1999). In the subsequent proceeding, the Court of Appeals dismissed the case, without regard to the prior stipulation, referencing the timeliness in relation to the 1996 LNP rulemaking decision.

<sup>4</sup> *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, 330 F.3d at 508 (citing *NLRB Union v. FLRA*, 834 F.2d 191, 195-97 (D.C. Cir. 1987)).

<sup>5</sup> Because the Commission failed to timely address the Expedited Petition and in light of wireless carriers' November 24, 2003 LNP implementation deadline, a Motion for Stay and Petition for Writ of Mandamus have been filed at the Commission and at the Court, respectively. See, In the Matter of Telephone Number Portability, *Emergency Motion for Stay of the CMRS LNP Deadline*, CC Docket No. 95-116 (August 15, 2003); *Petition for a Writ of Mandamus to the Federal Communications Commission*, (D.C. Cir. filed August 29, 2003) ("Petition for Writ").

escalating obligations based on the type of carrier involved.”<sup>6</sup> Subsection (a) of Section 251 stipulates the general duties of each telecommunication carrier; subsection (b) sets forth the obligations of all local exchange carriers; and subsection (c) states additional obligations for incumbent local exchange carriers. Subsection (b)(2), which as noted above is applicable to only local exchange carriers, imposes the “duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.”<sup>7</sup> Importantly, Congress specifically excluded CMRS carriers from the definition of local exchange carriers,<sup>8</sup> and the Commission has followed up that statutory definition by declaring that CMRS providers are not subject to the statutory requirement imposed on local exchange carriers (“LECs”).<sup>9</sup>

As the Petitioning Carriers correctly note, “[t]he exclusion of carriers other than LECs from LNP requirements and other section 251(b) requirements reflects a deliberate choice by Congress, negating any implied power of the Commission to choose otherwise.”<sup>10</sup> Thus, given the language in Section 251 combined with legal precedent, Congress clearly and intentionally chose to exclude the wireless industry from LNP requirements.

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<sup>6</sup> *Guam Public Utilities Commission*, 12 FCC Rcd. 6925, 6937-38 (1997).

<sup>7</sup> 47 U.S.C. § 251(b)(2).

<sup>8</sup> *See* 47 U.S.C. § 153(26) (defining a local exchange carrier: “The term “local exchange carrier” means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.”).

<sup>9</sup> *See, also, Petition of the State Independence Alliance for a Declaratory Ruling*, 17 FCC Rcd. 14802, 14806 (2002).

<sup>10</sup> Expedited Petition at p. 6.

B. The Commission lacks authority to impose LNP requirements on CMRS carriers.

The Commission inappropriately relies on its “independent authority” to apply LNP requirements to CMRS carriers.<sup>11</sup> As the Petitioning carriers correctly note in their extensive discussion, the Commission cannot rely on general powers to overcome the specific intentions of Congress.<sup>12</sup> Moreover, a dangerous precedent will be established if the Commission exercises such broad-ranging authority on this basis. As petitioners in the Petition for Writ note, “to uphold the FCC’s arguments would provide federal agencies ‘virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.”<sup>13</sup> Thus, without affirmative mandates and a grant of specific authority from Congress, the Commission lacks authority to impose LNP requirements on CMRS carriers.<sup>14</sup>

**III. CONCLUSION**

For reasons discussed herein and in the Petitioning Carriers’ Expedited Petition, the Commission must rescind the LNP requirements that have been imposed on CMRS carriers.

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<sup>11</sup> See *LNP First Report and Order*, 11 FCC Rcd. 8352, 8431 (1996). See also, *Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, Memorandum Opinion and Order, 17 FCC Rcd. 14972 (2002) (referencing the FCC’s discussion implying it has authority to mandate LNP on wireless carriers). The Commission relies on Section 1, 47 U.S.C. § 151; Section 2, 47 U.S.C. § 152; Section 4(i), 47 U.S.C. § 154(i); and Section 332, 47 U.S.C. § 332 as its basis for mandating LNP for wireless carriers. As noted in the Petition for Writ, the Commission’s reliance on these sections of the Code does not withstand legal precedent and scrutiny to support its authority to impose LNP requirements on CMRS carriers. See Petition for Writ at pp. 12-13.

<sup>12</sup> See Expedited Petition at pp. 7-13. See also, *Motion Picture Ass’n v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (specific delegation of authority must be granted to the FCC for it to have “necessary and proper” authority).

<sup>13</sup> Petition for Writ at p. 13 (citing *Ry. Labor Executives*, 29 F.3d at 671, citing *Chevron*, 467 U.S. at 843-44).

<sup>14</sup> Further supporting the Commission’s lack of authority to mandate LNP for wireless is its continued inability to craft any rules governing wireless carriers’ obligation to port. The most recent example of this Commission shortcoming is its wanting attempt to clarify the business rules governing wireless carriers port-out and port-in requirements. See *Memorandum Opinion and Order*, CCD. No. 95-116, FCC 03-237, released Oct. 7, 2003. This inability to craft rules to govern wireless LNP endorses Congress’ decision that LNP should be limited to LECs and not applied to the already hyper-competitive wireless industry.

Respectfully submitted,  
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October 16, 2003

## **CERTIFICATE OF SERVICE**

I, Laura L. Holloway, hereby certify that on this 16th day of October 2003, I caused a copy of the attached Comments of Nextel Communications, Inc. to be served via First Class Mail to the following:

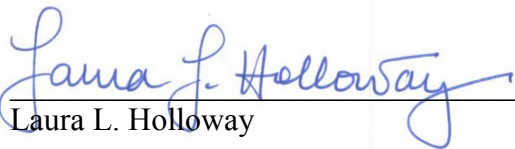
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